86-293

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

DANIEL THOMAS REYES,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THOMAS J. NOLAN
Counsel of Record
600 University Avenue
Palo Alto, CA 94301
Telephone No. (415) 326-2980
Counsel for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Whether the rule of *United States v. Ross*, 456 U.S. 798 (1982), which establishes the validity of warrantless searches of automobiles and their contents, sanctioned the search of petitioner's suitcases located within his vehicle when it was suspected prior to their placement there that they contained narcotics and a cursory search of the vehicle yielded no contraband.

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Petitioner, Daniel Thomas Reyes, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeal for the Fifth Circuit entered in this proceeding on June 24, 1986.

OPINIONS BELOW

The citation of the opinion of which review is sought in this Court is *United States v. Reyes,* 792 F.2d 536 (5th Cir. 1986).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1), on the ground that his rights under the Fourth Amendment to the United States Constitution were violated.

The judgment of the Court of Appeal for the Fifth Circuit was entered on June 24, 1986. No petition for rehearing was filed.

This petition for certiorari is filed within sixty days of June 24, 1986.

STATEMENT

1. On October 7, 1985, James Dixon, a sergeant with the Ector County Sheriff's Department Narcotics Division, received information from an informant that a Mexican male, "Daniel," was in Room 414 of the Holiday Inn between Odessa and Midland, Texas. Furthermore, "Daniel" was in possession of four pounds of cocaine, was heavily armed and was driving a black and silver Blazer with California temporary tags. The informant had seen a quantity of cocaine inside the Blazer and inside the motel room within twenty-four hours of conveying the information. [RT[1] 14-15]

After receiving the information, Dixon went to the Holiday Inn in order to corroborate the details. [RT 16-17] Upon arrival, he observed petitioner loading up suitcases and what appeared to be a gun case into the back of a Blazer which fit the aforementioned description. Dixon spoke with the motel manager and found that petitioner had checked into room 414 nine days earlier and had run up a $600.00 phone bill. Prior to leaving the motel, Dixon overheard petitioner checking out. [RT 19]

Dixon followed petitioner as he drove away and eventually, with the aid of a backup unit, effected a stop of the vehicle. [RT 21] A search of the vehicle was conducted at the scene, without a search warrant. [RT 28] Officers opened a small nylon athletic bag found among some suitcases. A smaller, locked, bag within contained cocaine. [RT 28-30] Petitioner was thereafter arrested and charged with violation of 21 U.S.C. § 841(a)(1), possession with intent to distribute cocaine.

2. Petitioner through counsel made a motion to suppress the cocaine obtained as a result of the search. The United States District Court for the Western District of Texas denied the motion.

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[1] "RT" refers to the Reporter's Transcript of the suppression hearing held on November 18, 1985.

3. On appeal following petitioner's conviction, a panel of the Fifth Circuit Court of Appeals affirmed the decision. The court held that this case is governed by the standards set forth in *United States v. Ross*, 456 U.S. 798 (1982), that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* at 2173, cited in *United States v. Reyes, supra*, 792 F.2d at 541.

REASONS FOR GRANTING THE PETITION

Review by this Court is warranted in order to determine the scope of this Court's decision in *United States v. Ross*, 456 U.S. 798 (1982) and the effect of *Ross* on this Court's earlier decisions in *United States v. Chadwick*, 433 U.S. 1 (1977) and *Arkansas v. Sanders*, 422 U.S. 753 (1979). This case presents a tension between earlier decisions and the broadened automobile exception pronounced in *Ross*, which must be resolved in order to provide guidance for effective law enforcement and lower courts. The gist of this case involves the point at which an automobile search ceases to be an automobile search.

In *United States v. Chadwick, supra*, 433 U.S. 1, federal agents seized a footlocker from the trunk of a car. At the time of seizing the footlocker, they had probable cause to believe it contained marijuana. The court refused to uphold the warrantless search, however, stating: "[A] person's expectations of privacy in personal luggage are substantially greater than in an automobile." *Id.* at 13. Similarly, in *Arkansas v. Sanders, supra*, 422 U.S. 753, police officers stopped a taxi after observing the defendant place his suitcase inside the trunk. Again, although officers had probable cause to believe the bag contained marijuana, the court held the warrantless search unlawful. In his concurring opinion, Chief Justice Burger succinctly explained the rationale:

> "Because the police officers had probable cause to believe that respondent's green suitcase contained marijuana before it was placed in the trunk of the taxicab, their duty to obtain a search warrant before opening it is clear under [*Chadwick*] . . .

> " . . . Here, as in *Chadwick*, it was the *luggage* being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was clearly coincidental, as in *Chadwick*. The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an 'automobile' exception case. The court need say no more." *Arkansas v. Sanders*, 442 U.S. 753 (1979) (*conc. opn.* of Burger, C.J.) [Cited in majority opinion of *United States v. Ross, supra*, 456 U.S. at 813.] [Emphasis in original]

The fact situation of *United States v. Ross, supra*, 456 U.S. 798 differed from *Chadwick* and *Sanders* in one crucial aspect. In *Ross*, an informant told police that the defendant kept narcotics in the trunk of his car. At the time the police effected a stop on the defendant's vehicle, they only knew that the narcotics were located somewhere in the trunk of the vehicle and their search of the trunk and containers within was thus held to be proper. The instant case presents a hybrid situation, similar to *Chadwick* and *Sanders* on one hand and similar to *Ross* on the other, which has not yet been analyzed by this Court. The duality stems from the informant's statement that he had seen cocaine in both the informant's room and the vehicle. Petitioner posits that two different standards governed the search in this case.

When Officer Dixon arrived at the motel and saw petitioner placing his suitcases into the car, Dixon believed that the baggage contained cocaine which had previously been in room 414. This situation is identical to *Chadwick* and *Sanders* because in both those cases, the police had probable cause to believe that contraband was in a specific bag placed in a vehicle. As in those cases, the relationship between the Blazer and the cocaine from room 414 was purely coincidental. In fact, the search of the bags was not an automobile search at all. Dixon just happened to arrive when petitioner was packing his car, yet the fortuitousness of his timing could not act as a catalyst to trigger the automobile exception. The proper course of action in order to retrieve the cocaine from the bags in the instant case was for Dixon to seize

the bags and obtain a search warrant. In *Ross,* this Court acknowledged its previous conclusion that there is a significant difference between the seizure of a parcel and its subsequent search and that the search involves " 'a far greater intrusion into Fourth Amendment values . . . ' (citation)." *United States v. Ross, supra,* 456 U.S. at 812, n. 16.

Confusion is generated in this case by the informant's observation of cocaine in the vehicle as well as in the motel room. Petitioner contends however that the informant's statement did not change the permissible scope of the search from one necessitating a warrant to one which did not. While the informant's statement may have established probable cause for a warrantless search of the vehicle in order to retrieve the cocaine purportedly seen in the vehicle, it did not support a search for the cocaine seen in the room which was later moved into a suitcase and placed in the vehicle. The court below however, reached a holding which is contrary:

> "The fact that [Dixon] observed Reyes check out of the motel and eventually leave its physical surroundings allowed him reasonably to conclude that the cocaine was in the Blazer. But that was the extent of his knowledge. Therefore, probable cause extended to the entire vehicle and its contents including the cocaine-filled nylon bag. ¶ The present case fits squarely within the *Ross* holding that 'if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.' [Citation.]" *United States v. Reyes, supra,* 792 F.2d at 541.

This holding abrogates the decisions in *Chadwick* and *Sanders,* yet petitioner submits that this Court did not limit those decisions by its clarification of the automobile exception to the warrant requirement in *Ross.* In fact, this Court specifically stated, "Although we have rejected some of the reasoning in *Sanders,* we adhere to our holding in that case." *United States v. Ross, supra,* 456 U.S. at 824. Furthermore, this Court recently cited *Chadwick* in *United States v. Johns* (1985) ____ U.S. ____, 83 L.Ed.2d 890, 895.

Although *Ross* upheld the search for contraband when officers simply know that it is located somewhere in a vehicle, petitioner submits that the decision does not sanction searches into places where it is known that contraband could not be located. In this case, the officers had to know that the cocaine which the informant had seen in the car, which was the only cocaine which could be searched for without a warrant, could not possibly be located in the luggage. The *Ross* court stated, "If probable cause justifies the search of lawfully stopped vehicle, it justifies the search of every part of a vehicle and its contents *that may conceal the object of the search.*" *United States v. Ross, supra,* 456 U.S. at 825 (emphasis added). Because petitioner had just placed the suitcases in the car, those bags could not possibly conceal the object of the search—the cocaine rumored to be in the Blazer.

In summary, petitioner contends that if in searching the Blazer, the officers were looking for the cocaine which was purportedly seen in room 414, and if they had probable cause, then they could seize the bags but they were required to obtain a warrant. On the other hand, if the officers were searching for the cocaine which they believed was in the Blazer due to the informant's statement that he had seen cocaine there, they could search the vehicle, but not the bags because the bags could not possibly contain the object of their search.

Simply placing a container into a vehicle does not automatically trigger the automobile exception to the warrant requirement. Once the officers made a conscious decision to open the suitcases, they were no longer searching for cocaine "in the Blazer," and they should have known that the focus of their search was the cocaine from the motel room. At that point, the search ceased being an automobile search and this Court's decisions in *Chadwick* and *Sanders* mandated that officers obtain a search warrant. Petitioner submits that this Court's decision in *United States v. Ross, supra,* 456 U.S. 798 does not change that requirement. This case is an excellent vehicle to resolve any tensions existing between Ross and the earlier decisions.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: August 19, 1986.

Respectfully submitted,

THOMAS J. NOLAN
Counsel for Petitioner

(Appendix follows)

Appendix

United States Court of Appeals
For the Fifth Circuit

No. 85-1795
Summary Calendar

United States of America,
Plaintiff-Appellee,

v.

Daniel Thomas Reyes,
Defendant-Appellant.

Filed June 24, 1986

Before: Henry A. Politz, Will Garwood and
E. Grady Jolly, Circuit Judges.

Opinion by Judge E. Grady Jolly

Appeal from the United States District Court
for the Western District of Texas
Lucius D. Bunton, District Judge, Presiding

OPINION

E. GRADY JOLLY, Circuit Judge:

The appellant Daniel Reyes was charged with two counts of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). At trial, Reyes moved to suppress the fruits of a search of his vehicle and personal effects, but the motion was denied by the district court. Reyes was found guilty on both counts and was sentenced to concurrent prison terms of fifteen years and three years, as well as to a special fifteen-year parole term. Reyes argues on appeal that the search of his vehicle and personal effects was made without probable cause. He argues in the alternative that even if probable cause existed, the wholesale search of his vehicle and luggage without a warrant is not supported by the automobile exception to the search warrant requirement. Having reviewed the record and the briefs, we find no merit to Reyes' arguments, and therefore affirm his conviction.

I

On October 7, 1985, Gordon Ridings, a United States Customs Investigator in Presidio, Texas, received a phone call from a confidential informant whom he had known for two years. The informant told Ridings that a Mexican named Daniel, who had been staying in Room 414 of the Holiday Inn on Highway 80 between Odessa and Midland, Texas, for the past ten days, was in possession of a large quantity of cocaine. The informant further indicated that Daniel, whom he described as heavily armed and dangerous, drove a black and silver 1985 Chevrolet Blazer ("Blazer") with a temporary California license tag located in the back window. Additionally, Riding was told that the informant had personally seen cocaine in Daniel's vehicle and motel room within the previous twenty-four hours.

Pursuant to an agreement between Customs and the DEA, Ridings relayed this information to DEA Agent Larry Nichols. Nichols, who had a court appearance later that day and therefore would be unable to handle this matter, contacted James Dixon of the Odessa Sheriff's Office to investigate. Dixon, a sergeant in the Sheriff's Department's Narcotics Division, was an experienced narcotics investigator. After Ridings briefed Dixon on the details, Dixon contacted the U.S. Attorney's Office, which advised him to go to the Holiday Inn and attempt to corroborate the informant's story before seeking a search warrant. Later that same morning, Dixon and Officer Christopher Clark of the Odessa Police Department arrived at the Holiday Inn where they immediately observed a Mexican male loading suitcases and gun cases into a vehicle fitting the informant's description. The Blazer was parked in front of Room 414. Dixon entered the motel and requested the records for Room 414 from the motel manager. The manager provided records from September 29 to October 7, 1985, and informed Dixon that the occupant's name was Daniel Reyes. The records indicated approximately $600 worth of long distance telephone calls made in that period of time. Before leaving the motel, Dixon noticed that the Mexican male he had observed earlier was standing at the front desk. Dixon overheard him say that his name was Daniel Reyes and that he would like to check out of room 414. Dixon and Clark then left the motel area,

radioed for assistance, and parked where they could observe the Blazer.

Reyes departed the motel in the Blazer, and was followed by Dixon and Clark. Less than ten minutes later, Dixon and Clark, along with two local police officers who had joined them, stopped Reyes, removed him from the Blazer, and handcuffed him. The four law enforcement officers then proceeded to search the Blazer, including the suitcases and gun cases contained inside. Specifically, they opened a small nylon zippered athletic bag found under the suitcases which contained $12,000 in cash, a gun, a shoulder holster, and a smaller locked nylon bag. Dixon then took the keys out of the ignition and opened this bag. Inside were one and one-half pounds of eighty-three per cent pure cocaine, diazepam, and some pills. They also found four handguns, one of which was loaded, a rifle, and a shotgun. The fruits of this search formed the basis of the October 9, 1985, indictment.

On October 21, 1985, Reyes moved on fourth amendment grounds to suppress the evidence gained from the October 7, 1985, search. After an evidentiary hearing, the district court denied the motion. Subsequently, Reyes waived his right to a jury trial and was found guilty by the district court after a two-day bench trial.

II

A.

Reyes argues that the search of his vehicle and the articles therein was unlawful because it was not based on probable cause. He contends that probable cause was lacking because the police relied on information provided by an untested informant and failed to corroborate any significant facts which could reasonably lead the police to believe that he possessed narcotics. In the alternative, he submits that even if probable cause existed, it was only reasonable for the government to believe that narcotics were in the luggage. Consequently, he argues that the wholesale warrantless search of the Blazer and all its contents is not supportable by the automobile exception.

"A citizen does not surrender all the protections of the Fourth Amendment by entering an automobile." *New York v. Class*, ____ U.S. ____, 106 S.Ct. 960, 965, 89 L.Ed.2d 81 (1986). The automobile exception to the fourth amendment's warrant requirement protects only searches supported by probable cause. Only the prior approval of the magistrate is waived; the search otherwise must be such as the magistrate could authorize. *United States v. Ross*, 456 U.S. 798, 823, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

This circuit has consistently held that the automobile exception applies where there are both exigent circumstances and probable cause to believe that the vehicle in question contains property that the government may properly seize. *See United State v. Cisneros-Mireles*, 739 F.2d 1000, 1002 (5th Cir. 1984). Here, as in *Cisneros-Mireles*, probable cause is based upon an informant's tip. Thus, *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) provides the applicable standard of review. In *Gates*, the Supreme Court announced that a "totality-of-the-circumstance" test is to be applied to determine whether an informant's tip provides probable cause. According to *Gates*, the search for probable cause involves "a practical, common-sense decision whether, given all the circumstances . . ., including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238 103 S.Ct. at 2332. Although an informant's veracity, reliability, and basis of knowledge still should be considered, "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Gates*, 462 U.S. at 233, 103 S.Ct. at 2329; *see generally United States v. Marbury*, 732 F.2d 390 (5th Cir. 1984). Here there was probable cause to believe Reyes' automobile contained narcotics.

A review of Supreme Court and Fifth Circuit precedent reveals several factors that are helpful in evaluating this particular cause. First of all, innocent behavior can support a finding of probable cause. As the Supreme Court stated in *Gates*, the relevant inquiry in determining probable cause "is not whether particular conduct

is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of non-criminal activity." *Gates,* 462 U.S. at 244 n.13, 103 S.Ct. at 2335 n.13; *see also United States v. Mendoza,* 722 F.2d 96, 101 (5th Cir. 1983).

Although the usual method of proving an informant's reliability is to point to information provided in the past that turned out to be truthful, this is not the only method. An informant's tip can be confirmed by independent police work which corroborates the information received. *See United States v. Phillips,* 727 F.2d 392, 396 (5th Cir. 1984). Additionally, the credibility of an informant's tip is strengthened if it is made in great detail, thus evincing a strong basis for the informant's knowledge. *See Marbury,* 732 F.2d at 396 & n.4; *Phillips,* 727 F.2d at 399.

The surrounding facts and information are not to be viewed in isolation but must be viewed in the light of their having been evaluated by trained law enforcement officials. What appears quite innocent to the untrained eye may be significant to the trained law enforcement official. *See Mendoza,* 722 F.2d at 102. Finally, an informant's tip is buttressed by the fact that it is based on his own personal observation rather than on hearsay. *See Cisneros-Mireles,* 739 F.2d at 1003.

B.

In the present case, Ridings had known the informant for more than two years and considered him to be reliable even though he had never supplied Ridings with information leading to an arrest or conviction. The informant had gained Ridings' trust because on several occasions Ridings had questioned him concerning his whereabouts at particular times which were already known by Ridings. Each time the informant answered truthfully.

Just as important, numerous detailed facts were supplied by the informant. Specifically, he informed Ridings of (i) the suspect's first name, (ii) where he was staying, (iii) how long he had been there, (iv) the make, year, and color of his vehicle, (v) the type of contraband, and (vi) the fact the suspect was armed. More important, all this information was based on the informant's personal knowledge, which is evinced by his statement to Ridings

that he had seen the cocaine in the Blazer and room 414 within the past twenty-four hours.

Additionally, much of the information supplied by the informant was corroborated by Dixon during his visit to the Holiday Inn. His observation of a Mexican male loading suitcases and gun cases into a black and silver Blazer outside of room 414 corroborated the tip. Futher corroboration was provided by Dixon's discovery that the occupant at room 414 had been there for the past ten days and was named Daniel. A finding of probable cause was also strengthened by Dixon's own independent observations while at the Holiday Inn. He observed records that showed that Reyes had placed $600 worth of phone calls during his ten-day stay, which were paid for in cash. In fact, Dixon learned that Reyes paid his entire motel bill, about $1,000, in cash. At the suppression hearing, Dixon, a trained narcotics expert, testified that his experience showed that narcotics traffickers often pay with cash and use the telephone extensively for long distance calls.

Since Dixon was able to corroborate the informant's tip, the government was justified in believing the statement that cocaine was in the Blazer. Moreover, since Dixon personally observed Reyes check out of the motel and pack his belongings into the Blazer, the government could reasonably infer that the cocaine supposedly located in the motel room was transferred into the Blazer. Therefore, when all the information gathered from the informant and Dixon's personal observations is considered in the light of Dixon's extensive narcotic investigation experience, we conclude that the authorities had probable cause to believe contraband was inside the Blazer when Reyes exited the Holiday Inn parking lot.

The exigent circumstances surrounding the investigation were also sufficient to justify a warrantless search of the Blazer. Since the officers were at the motel attempting to corroborate the informant's tip to justify obtaining a search warrant, they cannot be faulted for failing to have one in their possession at that time. More important, the suspicion that Reyes would soon depart was clearly warranted by the fact that immediately after loading the Blazer, he checked out of his room and left the motel in the

Blazer. We therefore conclude that the circumstances were sufficiently exigent to justify the search and seizure.

III

In *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), the Supreme Court held that when police officers have probable cause to search an automobile for contraband, they may also conduct a warrantless search of any containers found inside that may conceal the objects of the search. Reyes contends that *Ross* is clearly distinguishable from his case, and that if probable cause existed, it existed only as to the luggage, and the full scale warrantless search of the Blazer and luggage does not fall within the automobile exception to the warrant requirement. He relies on the pre-*Ross* decisions in *United States v. Chadwick,* 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), and *Arkansas v. Sanders,* 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), to buttress his argument. *Chadwick* and *Sanders,* however, are clearly distinguishable from the present case.

In *Chadwick,* federal agents seized a footlocker from the trunk of a car. At the time the footlocker was seized, the agents had probable cause to believe it contained marijuana because a trained dog had signalled the presence of the drug. The Court refused to uphold the warrantless search, stating that "a person's expectations of privacy in personal luggage are substantially greater than in an automobile." *Chadwick,* 433 U.S. at 13, 97 S.Ct. at 2484. In *Chadwick,* however, the government did not argue the applicability of the automobile exception since they had probable cause to believe that narcotics were in the footlocker before it was placed in the car. *See also United States v. Johns,* ___ U.S. ___, 105 S.Ct. 881, 884, 83 L.Ed.2d 890 (1985).

In *Sanders* a police officer was tipped by a reliable informant that the defendant would arrive at the local airport on a specified flight later that day with a green suitcase containing marijuana. The officer went to the airport where he observed the defendant place a green suitcase in a taxicab. Shortly thereafter, the taxicab was stopped and searched. Once again the government had probable cause to believe the bag contained marijuana and to search the bag before it was placed in the taxi, so the court held

the warrantless search unlawful. In his concurring opinion, Chief Justice Burger explained the Court's rationale:

> Because the police officers had probable cause to believe that respondent's green suitcase contained marihuana before it was placed in the trunk of a taxicab, their duty to obtain a search warrant before opening it is clear under [*Chadwick*] . . . .
>
> Here, as in *Chadwick*, it was the *luggage* being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental, as in *Chadwick*. The fact that the suitcase was resting in the trunk of the automobile at the "time of the respondent's arrest does not turn this into an automobile" exception case. The Court need say no more.

Sanders, 442 U.S. at 766-67, 99 S.Ct. at 2594-95.

Here, although the government agents had probable cause to believe narcotics were in the Blazer, they had no reason to know the exact location. Although the informant told Ridings that he saw cocaine in the Blazer and the motel room, he failed to specify exactly where it was or what it was in. Furthermore, Dixon had observed Reyes loading his belongings into the van, but he had no way of knowing whether the cocaine was already in the vehicle or in the bags being carried out. The fact that he observed Reyes check out of the motel and eventually leave its physical surroundings allowed him reasonably to conclude that the cocaine was in the Blazer. But that was the extent of his knowledge. Therefore, probable cause extended to the entire vehicle and its contents including the cocaine-filled nylon bag.

The present case fits squarely within the *Ross* holding that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Ross*, 456 U.S. at 825, 102 S.Ct. at 2173.

The defendant's conviction is

AFFIRMED.